UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KENNETH W. BRASSARD

v. C.A. No. 00-360L

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ronald R. Lagueux, United States District Judge.

Pursuant to 28 U.S.C. § 2255, the pro se petitioner, Kenneth W. Brassard, has filed a motion to vacate, set aside or correct sentence. For the reasons set forth below, the motion is denied. No evidentiary hearing is necessary.

Facts and Travel

Brassard was convicted following a jury trial of one count of attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and one count of using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). Brassard's conviction stemmed from his attempted purchase of cocaine from an undercover police officer on January 26, 1996.

Brassard operated a janitorial business engaged in the cleaning of retail fast-food establishments. In June 1995, Brassard, in an attempt to procure additional work, approached Ronald Rego, who, at the time, was the manager of a Burger King franchise in South Attleboro, Massachusetts. Unbeknownst to petitioner, Rego also was an informant for the Providence Police Department.

Brassard advised Rego that his company cleaned other Burger King restaurants and inquired as to the possibility of acquiring the South Attleboro restaurant as a client. According to Rego,

Brassard offered him a kickback in exchange for the cleaning contract. At trial, Brassard denied the allegation.

Brassard and Rego remained in contact over a several-month period. Eventually, a possible cocaine deal became a subject of the conversations between Brassard and Rego.

According to Rego, it was Brassard who, during one of their earliest conversations, initiated discussion of the topic by inquiring as to whether Rego had any contacts in the drug business. At trial, Rego recollected that Brassard claimed to have been involved previously in the illicit drug trade and that Brassard indicated that he wanted to reenter the business. Rego testified that Brassard repeatedly asked Rego to put him in contact with a drug dealer. Ultimately, Brassard was put in contact with an alleged drug dealer named "Raul". In fact, "Raul" was Detective Freddy Rocha, an undercover narcotics officer with the Providence Police Department.

Claiming entrapment, Brassard testified that it was Rego who broached the subject of a drug transaction. At trial, Brassard recalled that, during the approximate five-month period in which he was attempting to secure additional cleaning work through Rego, the informant continuously pressured him to purchase cocaine from his "contacts". In fact, Brassard testified that Rego attempted to secure his participation by constantly telephoning and paging him. Brassard recalled that Rego contacted him on at least one-hundred occasions over the five-month period. During each conversation, Rego allegedly raised the subject of a possible drug deal.

Brassard denied any previous involvement in the drug trade. Moreover, Brassard testified that he never had any interest in participating in a drug transaction but had feigned interest in an attempt to secure a cleaning contract through Rego.

Despite his initial reluctance to participate in a cocaine transaction, Brassard testified that he

eventually capitulated due to his dire financial circumstances and because Rego assured him that he would resell the drugs for him. Brassard recollected that Rego "coached" him on how to act like a drug dealer in negotiating with Rego's contacts, including advising Brassard to claim a prior history of drug-dealing. Moreover, Rego allegedly instructed Brassard to carry a gun during the cocaine purchase.

In January 1996, Rocha, posing as Raul, telephoned Brassard. After several discussions, Brassard agreed to purchase a kilogram of cocaine from "Raul" for $18,000. A portion of the payment price was to be secured by Brassard's mobile home. Unbeknownst to Brassard, Rocha recorded each conversation.

On January 26, 1996, Rocha and Brassard met in a hotel in Providence.[1] In exchange for a $5,000.00 down payment, Brassard was given a package purported to contain one kilogram of cocaine. In fact, the package, which had been prepared by Rocha and another law enforcement officer, contained mostly plaster and oatmeal, with a small amount of cocaine in the center. Brassard was arrested immediately following the exchange. He was carrying a loaded .357 Magnum pistol.

On August 28, 1996, a district court jury adjudged Brassard guilty of attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841 (a)(1), and of using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1).

On July 2, 1997, Senior United States District Judge Raymond J. Pettine sentenced Brassard to a term of 60-months imprisonment on the drug conviction and a five-year consecutive sentence

[1] Rocha was wearing a body wire which allowed authorities to monitor and record the audio portion of the encounter.

on the firearm count. In addition, the court imposed a four-year term of supervised release and a $100.00 special assessment. Brassard filed an appeal from his conviction and sentence. The First Circuit affirmed. United States v. Brassard, 212 F.3d 54 (1st Cir. 2000).

Brassard now seeks relief from sentence pursuant to 28 U.S.C. § 2255. In support of his motion, petitioner alleges that his former defense counsel's representation prior to and during trial was deficient.

Discussion

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)). A defendant alleging ineffective assistance of counsel must demonstrate both that counsel's conduct fell below an objective standard of reasonableness and that he was prejudiced by the attorney's deficient performance. Id. at 687-88.

The adequacy of a defense attorney's representation is evaluated from counsel's perspective as of the time of trial and pursuant to a deferential standard. Specifically, "[the] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'." Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

The "prejudice" prong of the Strickand standard requires that the defendant demonstrate that there is a reasonable probability that, but for the attorney's deficient representation, the result of the proceeding would have been different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In alleging that former defense counsel's representation was inadequate, Brassard faults the attorney for allegedly failing to obtain and utilize Brassard's telephone and pager records in furtherance of his entrapment defense. Brassard contends that the records would have revealed that Rego initiated numerous telephone conversations with petitioner. In substance, Brassard alleges that the records were material to demonstrating his lack of predisposition to commit the drug offense charged and to show the extensiveness of the informant's efforts in encouraging Brassard's participation.

However, Brassard has failed to make even a preliminary showing that any such records existed then or were available during trial, or that they would support his contention that Rego made "hundreds" of calls to him. In fact, it is equally probable that any such records would have contradicted Brassard's trial testimony regarding the numerous contacts allegedly initiated by Rego. Accordingly, Brassard has not proffered any evidence which, if proven, would demonstrate that defense counsel's representation was deficient in this regard.

Brassard also asserts that defense counsel "failed to interview and call witnesses who would have some testimony to give relating to Defendant's state of mind at having been approached by the informant about participating in a cocaine transaction." Petitioner's Memorandum in Support of § 2255 Motion at 3, ¶ 3. Only one such potential witness, Timothy Bolster, has been identified by petitioner.

Brassard contends that Bolster would have testified that, six months prior to petitioner's arrest, Brassard told Bolster that Rego had asked petitioner if he wanted to purchase some cocaine. Brassard and Bolster purportedly discussed whether Brassard should report the incident to law enforcement personnel. Out of concern that such action would endanger Brassard's business

relationship with Burger King, Bolster allegedly advised Brassard not to do so.

Brassard contends that Bolster's testimony was relevant to a showing of his lack any predisposition to participate in a drug offense. Nonetheless, Brassard has failed to provide the court with any indication as to Bolster's availability as of the time of trial or of the admissibility of his testimony. Moreover, petitioner has not provided an affidavit from Bolster setting forth his recollection of his discussion with Brassard. In sum, petitioner has not demonstrated that defense counsel's failure to call Bolster as a trial witness was objectively unreasonable.

Next, petitioner faults the quality of defense counsel's representation with regard to the government's presentation of tape-recorded evidence to the jury. At trial, the government introduced audio tape recordings of all seven conversations that occurred between Brassard and "Raul". Five tapes were of telephone conversations. The remaining tapes memorialized the two face-to-face meetings between the two men, including the attempted cocaine transaction itself.

As an aid to their understanding of the tapes, the jurors were provided with written transcripts which they were permitted to reference while the tapes were played in the courtroom. The transcripts were not introduced as evidence and were subsequently collected. In his jury charge, Judge Pettine instructed the jurors that only the tapes themselves, not the transcripts, were evidence. The transcripts were not available to the jury during its deliberations. The jury was permitted to listen to the tapes.

The first tape introduced was of a telephone conversation that occurred on January 22, 1996. The tape did not reflect the initial minute of Rocha's and Brassard's conversation. Accordingly, defense counsel objected to the tape's admission as a full exhibit. The trial judge overruled the objection.

Rocha testified as to the first tape's incompleteness. The reasons for the omission were not clear. However, Rocha testified that possible reasons for the omission included a tape recorder malfunction or a defective or damaged tape. Moreover, Rocha recalled the substance of the of the missing portion of his conversation with Brassard. The remaining six tapes were admitted as full exhibits without objection.

Brassard faults his trial counsel for "not properly objecting to the recording evidence and the recording transcripts being submitted to the jury." However, as set forth above, the transcripts were not evidence and the jury was so instructed. The transcripts were collected following the airing of the tapes and were not available to the jury thereafter. Providing the jury with a transcript as a guide in listening to a tape recording during trial is a practice permitted in this circuit. E.g., United States v. Rengifo, 789 F.2d 975, 980 (1st Cir. 1986).

Moreover, petitioner proffers no explanation for the basis of his apparent contention that the tapes themselves were inadmissible. In fact, Brassard's argument was considered and rejected by the First Circuit on direct appeal. United States v. Brassard, 212 F.3d at 57. The tapes were clearly relevant to a determination of Brassard's guilt of the crimes charged, including his claim of entrapment. A review of the trial transcript reveals that each tape was properly authenticated prior to admission. Since all seven tapes were admissible, counsel cannot be deemed to have performed inadequately in failing to object to the introduction of six of the seven tapes.

Brassard's contention that defense counsel was deficient in not requesting, before the tapes were played, that the trial judge instruct the jury that the transcripts were not evidence and that, if the tapes and transcripts differed, the jurors should rely on what they heard, is similarly without merit. Brassard has proffered no authority for his claim that a cautionary instruction was required

at that stage of the proceeding. Moreover, the jury was appropriately instructed prior to deliberation. Additionally, Brassard has not alleged that any transcript was, in fact, inaccurate.

Further, Brassard faults defense counsel for failing to seek a court order requiring an expert examination of the tapes for the purpose of determining whether any of the seven tapes had been altered, damaged or tampered with. Apparently, Brassard contends that the fact that one of the tapes was incomplete warranted such an examination. However, Brassard cannot seriously contend that the tapes contained other than an accurate memorialization of his conversations with Rocha. In fact, during his trial testimony, Brassard all but expressly admitted that the tapes recordings were accurate.

Finally, Brassard claims that defense counsel was ineffective at trial in that the attorney "was very slow in objecting to inadmissible and hearsay testimony being introduced at trial." Petitioner's Memorandum at 3, ¶ 2. The petitioner contends that "[t]he record is replete with examples of hearsay and inadmissible evidence that the jury heard, only because counsel was too slow in objecting to said testimony." Id. However, Brassard has failed to identify specifically even one such example. Accordingly, his claim does not warrant further consideration.

In summary, Brassard has failed to demonstrate that his trial counsel's representation was, in any way, deficient. Therefore, Brassard has not satisfied the first prong of the Strickland test.

Accordingly, for the above reasons, the motion of the petitioner, Kenneth W. Brassard, to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is denied.

IT IS SO ORDERED.

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Ronald R. Lagueux
United States District Judge
November , 2000